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No. 06-328

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IN THE

# Supreme Court of the United States

JOHN H. CARNEY; JAMES R. FISHER,
*Petitioners*,

v.

UNITED STATES OF AMERICA ET AL.,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF FOR OTS RESPONDENTS IN OPPOSITION

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## BRIEF FOR OTS RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals is unreported. It is available electronically at 2006 WL 1307556 (5th Cir. May 9, 2006), and is reprinted in petitioners' appendix ("Pet. App.") at 1a-2a. The order denying petitioners' petition for rehearing is reprinted in petitioners' appendix at 79a-80a. The district court's December 20, 2004 final judgment dismissing the case is reprinted in petitioners' appendix at 78a. The district court's December 20, 2004 order granting summary judgment on petitioners' malicious prosecution claim is reprinted in petitioner's appendix at 77a. The district court's September 30, 2004 order dismissing all claims against the OTS Respondents except for petitioners' malicious prosecution claims is available electronically at 2004 WL 2250277 (N.D. Tex. Sept. 30, 2004), and is reprinted in petitioners' appendix

at 3a-6a. The June 9, 2004 findings, conclusions and recommendation of the magistrate judge that petitioners' action against the OTS Respondents be dismissed with prejudice is available electronically at 2004 WL 1285037 (N.D. Tex. Jun. 9, 2004), and is reprinted in petitioners' appendix at 7a-42a. The district court's March 31, 2003 order dismissing all claims against OTS Defendant Edward Kraemer is available electronically at 2003 WL 21653853 (N.D. Tex. Mar. 31, 2003), and is reprinted in petitioners' appendix at 43a-50a.

## JURISDICTION

The United States Court of Appeals for the Fifth Circuit affirmed dismissal of petitioners' claims on May 9, 2006 (Pet. App. at 1a-2a.). The petitioners' petition for rehearing was denied by the Fifth Circuit on June 8, 2006 (Pet. App. at 79a-80a). The petition for a writ of certiorari was filed on September 6, 2006 and docketed on September 7, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## STATEMENT OF THE CASE

Seven years ago, petitioners initiated a *Bivens*[1] action, suing several federal officials in their individual capacities, including Respondents Nordstrom, Bruton, Klein, Riccobono, Lambert, and Teed—all current or former employees of the Office of Thrift Supervision ("OTS Respondents"). The thrust of petitioners' claims was that they were improperly prosecuted by the United States Department of Justice ("DOJ") in the mid-1990s, resulting in the deprivation of their constitutional rights. With respect to the OTS Respondents, petitioners claimed, in essence, that these government employees caused an indictment to be issued against them, improperly withheld and suppressed exculpatory information, and either perjured themselves or suborned perjury during

[1] *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

Plaintiffs' criminal trial. That trial resulted in petitioners' criminal convictions, in March 1995, for bank fraud, mail fraud, conspiracy, and making false statements.

In February 1997, the Fifth Circuit reversed petitioners' convictions on a number of grounds, including its conclusion that an FBI 302 witness statement constituted *Brady* [2] material that federal prosecutors should have provided to petitioners sooner. *See United States v. Fisher*, 106 F.3d 622 (5th Cir. 1997). Petitioners subsequently were retried and acquitted on October 3, 1997. Two years later, on September 3, 1999, petitioners filed this action in the United States District Court for the Northern District of Texas.

In their initial complaint, petitioners alleged constitutional and common law tort claims against the United States, the OTS, the Federal Bureau of Investigation ("FBI"), and federal employees in their official and individual capacities. In November 1999, all Defendants filed motions to dismiss, and moved to substitute the United States as the exclusive defendant for all common law claims. One month later, petitioners filed their First Amended Complaint. After a hearing in September 2000, the assigned Magistrate Judge recommended that all of petitioners' common law tort claims against the individual defendants be dismissed. In January 2001, the district court adopted the Magistrate Judge's recommendation and entered judgment accordingly.

In September 2001, the district court granted petitioners leave to file a Second Amended Complaint, which specifically identified three previously unidentified DOJ employees as parties to the case. The United States moved to dismiss the Complaint asserting, *inter alia*, that the claims were time barred. To avoid dismissal, petitioners sought leave to file a Third Amended Complaint. The district court granted leave, but with the proviso that this would be petitioners'

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[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

final opportunity to amend. The court further admonished petitioners to consider carefully whether all of the named defendants properly belonged in the case, and to dismiss any improperly named defendants. Instead, in April 2002, petitioners filed a Third Amended Complaint in which they *added* an additional defendant, OTS employee Edward Kraemer.

In March 2003, the district court, adopting the recommendations of the Magistrate Judge, dismissed petitioners' claims against the newly added defendants based on limitations grounds.[3] In November 2003, the OTS Respondents moved for summary judgment on all remaining claims against them. In response to that motion, the Magistrate Judge permitted petitioners to take limited discovery in late 2003 and early 2004 in the form of deposition testimony. On September 30, 2004, the district court—again adopting the recommendations of the Magistrate Judge—dismissed all claims against the OTS Respondents with prejudice, except for petitioners' malicious prosecution claims, on which the court reserved judgment pending further briefing. On December 20, 2004 the district court entered final judgment in favor of the OTS Respondents, dismissing all of petitioners' claims and denying—as "und[uly] late and prejudicial in light of the age and status of this case"—one final request by petitioners for leave to file yet another Amended Complaint. Pet. App. at 77a.

In dismissing petitioners' claims against the OTS Respondents, the district court judge (Honorable Barbara Lynn) adopted the findings of the Magistrate Judge that, *inter alia*:

- Petitioners' allegations that the OTS Respondents withheld exculpatory evidence should be dismissed because each of the OTS Respondents was entitled to

[3] Petitioners do not appeal the dismissal of claims as to any of the newly added individual defendants, including Edward Kraemer.

qualified immunity, and, in any event, petitioners failed to identify any evidence, or demonstrate any personal knowledge, that any OTS agent withheld exculpatory evidence;

- Petitioners' perjury claims against OTS Respondents Nordstrom and Lambert should be dismissed because petitioners failed to identify any evidence that Nordstrom's or Lambert's testimony was false, or that any exception existed to their absolute immunity as trial witnesses;

- Petitioners' allegations that the OTS Respondents suborned perjury should be dismissed because each of the OTS Respondents was entitled to qualified immunity, and, in any event, petitioners failed to identify any evidence that the supposed perjured testimony was false or that the OTS Respondents knew of the testimony when it occurred.[4]

Petitioners appealed the district court's dismissal of their claims to the Fifth Circuit. On May 9, 2006, less than one week after hearing oral argument on petitioners' appeal, the court of appeals, "having carefully reviewed the parties' briefs and pertinent portions of the record in light of the parties' oral arguments," affirmed the final judgment of the district court "essentially for the reasons stated in its controlling opinions." Pet. App. at 2a.

## ARGUMENT

The petition for certiorari should be denied. Petitioners contend that the Court should grant certiorari to review the dismissal of their claims against the OTS Respondents (a)

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[4] Judge Lynn also dismissed petitioners' malicious prosecution, supervisory liability, and failure to train claims against various OTS Respondents on a variety of grounds. Because petitioners do not appeal the dismissal of those claims, the OTS Respondents do not address them here.

because, they claim, the Fifth Circuit failed to conduct a *de novo* review of the district court's award of summary judgment; and (b) to resolve a purported conflict among the circuits on the issue of whether non-prosecutors may be held liable in a *Bivens* action for failure to produce *Brady* material to a criminal defendant.[5] Petitioners' claims fail because (a) there is no basis for their contention that the Fifth Circuit failed to conduct a *de novo* review; (b) the Fifth Circuit properly dismissed their claims for reasons inapposite to the question of any non-prosecutorial duty to disclose exculpatory material—including, *inter alia*, petitioners' failure to adduce *any* evidence to support their claims; and (c) there is no conflict of law which impacts the resolution of this case. In short, the petition for certiorari merits little attention and should be disposed of easily.

## I. PETITIONERS' CONTENTION THAT THE FIFTH CIRCUIT FAILED TO CONDUCT A *DE NOVO* REVIEW IS UNFOUNDED

*First*, there is no basis for petitioners' contention that the Fifth Circuit failed to conduct a *de novo* review of the district court's decision. The order states plainly that the court "carefully reviewed the parties' briefs and pertinent portions of the record in light of the parties oral arguments" before making its decision. Pet. App. at 2a. The mere fact that the Fifth Circuit agreed with the district court's "essential findings of fact and conclusions of law," and affirmed summary judgment "essentially for the reasons stated in [the district court's] controlling opinions," *id.*, suggests nothing more than that the appellate court concurred with the lower

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[5] Petitioners also ask this Court to grant certiorari because, they claim, the court of appeals erred in its application of 28 U.S.C. § 2679(d)(5). Because that claim was not raised against the OTS Respondents, it is not addressed here.

court's analysis and felt no need to restate the identical analysis.

## II. THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT THE OTS RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY AND THAT PETITIONERS FAILED TO ADDUCE COMPETENT EVIDENCE TO OVERCOME SUMMARY JUDGMENT.

*Second*, the court of appeals correctly affirmed the judgment of the district court that the OTS Respondents are entitled to qualified immunity from petitioners' *Bivens* claims, and that petitioners failed to adduce *any* evidence, or to demonstrate *any* personal knowledge, that *any* OTS Respondent withheld exculpatory evidence, committed perjury, or suborned perjury.[6] Despite being afforded the opportunity to take discovery in this case, petitioners were unable to uncover any evidence that any OTS Respondent violated their constitutional rights. Instead, the undisputed evidence in the case demonstrates that the OTS Respondents played no role in the prosecution of petitioners—including in any decisions regarding the production of materials to petitioners, the identity of trial witnesses, or the substance of witness testimony—nor were any of the OTS Respondents even aware of the testimony offered against petitioners at trial.[7]

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[6] Petitioners argue, without explanation, that they "submitted substantial summary judgment evidence" in opposition to the OTS Respondents' motions to dismiss, and ask that the court reject, out of hand, the "mere conclusory allegations" of the OTS Respondents. *See, e.g.*, Pet. at 5, 23. This is the same argument petitioners raised below and which was rejected multiple times by the lower courts.

[7] Here, too, petitioners simply repeat their argument, raised below, that the "undisputed summary judgment evidence demonstrates that [the OTS Respondents] were all part of the prosecution team." Pet. at 20. This argument, as well, was disputed by specific evidence and was rejected by the courts below.

The district court so held, and the appellate court agreed. Petitioners advance no compelling reason for a grant of the writ here; instead, they merely reassert the same unadorned conclusions rejected by each of the courts below.

## III. THERE IS NO CONFLICT FOR THE COURT TO RESOLVE IN THIS CASE.

*Third*, petitioners' remaining basis for seeking the writ—*i.e.*, the lower courts' alleged "heavy reliance" on *Mowbray v. Cameron County*, 274 F.3d 269 (5th Cir. 2001)—is meritless.[8] The district and appellate courts dismissed petitioners' claims because petitioners "failed to present competent summary judgment evidence showing that a genuine issue of fact or law exists as to whether each OTS [Respondent] withheld exculpatory evidence," Pet. App. at 35a, *not* based on any purported "black-letter rule-of-law" regarding an absolute duty of non-prosecutors to produce *Brady* material to criminal defendants. Pet. at 24. Petitioners' inability to provide any evidence to support a claim against any OTS Respondent itself is sufficient to deny the writ.

In any event, by asking this court to "correct" the Fifth Circuit's decision in *Mowbray v. Cameron County*, 274 F.3d 269 (5th Cir. 2001), Pet. at 24, petitioners seek to create a conflict where none exists. Petitioners rely on a series of cases which suggest that a non-prosecutor may violate the constitution by *deliberately* concealing exculpatory evidence from the defense. Pet. App. at 18-25. But that is not this case. Respondents, citing *Mowbray*, brought this very distinction to the attention of the Court of Appeals in their appellate brief, noting that the only *conceivably* arguable

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[8] Petitioners' reference to the Seventh Circuit's decision in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), Pet. at 22-23, similarly is beside the point. Neither the OTS Respondents nor the lower courts relied on (or referred to) *Buckley* to support dismissal of petitioners' claims. Nor does *Buckley* present any conflict for this case.

basis for a *Brady* claim against them would be if there were evidence of such deliberate concealment. But the courts below agreed that such evidence does not exist here. The Fifth Circuit in *Mowbray* similarly noted the absence in that case of any facts to support a finding that the defendants "elicited false evidence" or "deliberately concealed exculpatory evidence." 274 F.3d at 278, n. 5 (distinguishing *Geter v. Fortenberry*, 849 F.2d 1550 (5th Cir. 1988), which concluded that evidence of deliberate misconduct might defeat a police officer's qualified immunity).

Because *Mowbray* is consistent with the decisions cited by petitioners for purposes of this case, there is no conflict requiring resolution. Furthermore, because there is no evidence in this case that suggests deliberate concealment, and no evidence of any deliberate falsification of evidence by the OTS Respondents—each an independent basis for the dismissal of petitioners' claims below—this case is not the best vehicle to resolve any theoretical conflict regarding the existence or scope of any duty of non-prosecutors to provide exculpatory material to criminal defendants.

## CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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